

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

MUELLER ENERGY SERVICES, INC.

and

Case 3-CA-21261

TODD L. COPPOLA, An Individual

*William Trezevant, Esq., of Buffalo, NY,*  
for the General Counsel  
*Roger L. Sabo, Esq. (Shottenstein, Zox & Dunn),*  
of Columbus, Ohio for the Respondent.

DECISION  
Statement of the Case

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Buffalo, New York on January 11, and 12, 1999. The charge was filed on April 17, 1998 <sup>1</sup> and the complaint was issued on July 15. The complaint, issued by the Regional Director for the National Labor Relations Board's Region 3, alleges that the Respondent, Mueller Energy Services, Inc., violated Section 8(a)(3) and (1) of the National Labor Relations Act, (referred to as the Act) by discharging the Charging Party, Todd L. Coppola, (referred to below as Coppola) because he engaged in activity in support of International Union of Operating Engineers, Local Union No. 17 (referred to below as Local 17). The Respondent, Mueller, by its timely answer denied that it had committed the alleged unfair labor practice.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Mueller, I make the following

Findings of Fact

I. Jurisdiction

Mueller, a corporation, with an office and place of business in West Seneca, New York engages in providing gas line services. The complaint alleges, and the answer denies, that in conducting its business, Mueller annually provides services valued in excess of \$50,000 to National Fuel Gas Company, an enterprise directly engaged in interstate commerce. In its answer, Mueller admitted that it provided services valued in excess of \$50,000 to National Fuel Gas Company, without specifying the time period. However, I take administrative notice of Administrative Law Judge Eleanor MacDonald's findings on this issue, in her decision in *Mueller Energy Services, Inc., Case 3-CA-20542-1 and 2 (JD (NY)-28-98, May 4, 1998)*. In her decision, at p. 1, Judge MacDonald found that Mueller annually provided services "in excess of \$50,000 to enterprises directly engaged in interstate commerce." I also find that the Board took jurisdiction over Mueller in *Mueller Energy Services, Inc.*, 323 NLRB 785 (1997). From Judge

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<sup>1</sup> All dates are in 1998 unless otherwise indicated.

MacDonald's decision and the Board's action, I find that Mueller is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, Mueller's answer admits, and I find, that Local 17 is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

### A. *The Facts*

At all times material to this case, Mueller has been a gas distribution contractor installing new and replacement gas lines for gas companies in the Midwest and Western New York. In New York, Mueller has been under contract to perform such services for National Fuel Gas of Buffalo, New York. This service includes installation of main distribution lines, service lines, house piping and reconnecting service lines, when inside gas meters are moved outside. Mueller's corporate headquarters are in Lorain Ohio. Mueller also maintains an office at West Seneca, New York, in the vicinity of Buffalo, New York.<sup>2</sup>

Effective January 1, 1995, Mueller and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 8-215 were parties to a three-year collective-bargaining agreement covering Mueller's New York pipeline distribution construction employees, excluding work performed in New York City. The collective-bargaining agreement contains job descriptions and wage rates for laborers, operators, certified pipe welders, and foremen.<sup>3</sup>

Mueller hired Coppola in September 1995 as a laborer. After six or seven months, Mueller promoted Coppola to operator/foreman. Paul Gotto, manager of Mueller's West Seneca office was Coppola's immediate supervisor until sometime in 1997, when Pat Patterson became acting manager. In August of the same year, Tom Kostek became manager of the West Seneca office.<sup>4</sup>

As foreman, Coppola usually worked with one laborer or at most two. According to the collective-bargaining agreement, a foreman was an "[i]ndividual in charge of crew." However Coppola and the other foremen performed unit work while serving as foremen. Such unit work would consist of either operating equipment or being a laborer. Coppola worked as an operator. The crew's work consisted of reconnecting gas lines, installing house piping and moving gas meters from inside a structure to the outside.

Coppola received his crew's job assignments in his mailbox at Mueller's West Seneca office. The source of those assignments was Janet M. Keesler. Mueller hired Keesler on March 8, 1996, as an administrative assistant. Keesler became office manager approximately one year later. She worked in the same office with the manager of Mueller's West Seneca-based operations.<sup>5</sup>

As part of her responsibility, Keesler received work orders from National Fuel Gas

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<sup>2</sup> My findings regarding Mueller's business activity are based upon the testimony of its President, Bradley W. Olson.

<sup>3</sup> I find from Coppola's testimony that Mueller does not employ certified pipe welders.

<sup>4</sup> My findings regarding Coppola's employment history and his work at Mueller are based upon his uncontradicted testimony.

<sup>5</sup> My findings regarding Janet Keesler's employment history and duties at Mueller are based upon her uncontradicted testimony and that of Coppola.

Company and assigned them to crews. At the time of the hearing in this case, Keesler scheduled and directed the assignments of five crews. She noted the location of each job site and assigned the work order to the crew working in its vicinity. If a crew foreman called in to report that his team had finished a job, Keesler had authority to reassign that crew to a new jobsite. However, before pulling a crew off of one job and assigning it to another, Keesler must check with Kostek. Keesler received all the paperwork which Coppola and the other foremen prepared in connection with their assignments.

Keesler had authority to deploy crews as the work orders required. During a workday, Coppola would contact Keesler by radio for a further assignment, when his crew completed an assigned job or if an assigned job did not materialize. She would advise Coppola on the location of underground utilities and instruct him on work procedures for a particular assignment. Coppola followed Keesler's instructions regarding work procedures and assignments. If Keesler directed him to do something related to a work order, he did it without questioning her authority.

I find from the testimony of Mueller's President that Manager Kostek spends quite a bit of his worktime out of the West Seneca office, on job sites. On those occasions, Keesler is alone in that office.

Late in 1997, Keesler notified employee Saviano that he was to attend safety training if he wanted to work for Mueller. Relying on Keesler's advice, Saviano arranged to take the training.<sup>6</sup>

On one occasion, Keesler directed employee David Saviano to drive a Mueller truck and an attached trailer to a specific destination. Saviano refused, claiming that the truck's brakes were not working. Keesler told him to go home if he did not want to work. He went home.

When Coppola needed advice on a job or on whether to employ a procedure, ninety per cent of the time he would call Keesler. On the remaining occasions, he would seek help from his manager.<sup>7</sup>

The record does not show that Keesler had authority over personnel matters. I find from Keesler's uncontradicted testimony that she had no authority to hire, discharge, or to reprimand employees.

Appendix A of the collective-bargaining agreement between OCAW Local 8-215 and Mueller provided that the foremen's wage rate would be: "No less than the highest rate of pay for any project paid to any employee." Appendix A also stated that foremen "[m]ay receive additional compensation for supervisory functions being performed by the foreman." An addendum to their agreement, executed by Mueller and Local 8-215 on December 6, 1995, provided that foremen "may receive additional compensation for supervisory functions which as

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<sup>6</sup> My findings regarding Keesler's instructions to Saviano regarding training and driving a truck are based upon his testimony. She denied instructing him to attend safety training in Cleveland. However, her testimony regarding such encounters with employees showed that her recollection of specific incidents was blurred. As Saviano seemed to have a vivid recollection of her insistence that he attend the safety training, I concluded that his testimony was more reliable than Keesler's. Keesler did not testify about the asserted incident involving Saviano's refusal to drive a truck.

<sup>7</sup> My findings regarding Keesler's authority to switch crews and Coppola's reliance upon her for advice are based upon his uncontradicted testimony.

of December 6, 1995 are as follows: Fitting truck. If one is available. Holiday Pay. Guaranteed Forty Hours. 401K Savings Plan.”

As a foreman, Coppola was responsible for setting up a job, explaining it to the crew, making sure the necessary parts were present and seeing that it was properly completed. He also was the contact person between the crew and representatives of National Fuel regarding the assigned job. Coppola also interfaced with the public regarding the assigned job. If his crew opened a trench on a customer's property, Coppola was responsible for assuring that it was properly closed before the job was completed. Coppola worked on job sites as an operator and prepared the necessary paperwork for them, which he turned in to Keesler.

If Coppola encountered friction between his crewmembers, or if a member of his crew misbehaved, Mueller directed that he report such matters to his manager. Coppola also enforced Mueller's requirement that crewmembers wear hard hats at work. However, Coppola had no authority to discipline a crewmember for misconduct including failure to wear a hard hat. He could make a recommendation to the manager regarding discipline. There was no showing that Coppola's recommendations were effective. I find from Coppola's uncontradicted testimony that he did not have authority to hire, fire or promote employees. I also find from his uncontradicted testimony that, as foreman, Coppola did not have authority to grant time off to employees.

If a National Gas inspector found fault with the work of Coppola's crew, he or she reported the fault to Coppola. It was Coppola's responsibility to see that his crew corrected the work to the inspector's satisfaction. Coppola would suggest how his crew should perform the assigned work. However, if a member of his crew came up with a better idea, the crew would elect to adopt that idea. If a National Gas customer designated where he wanted a gas meter installed in his house, Coppola guided his crew accordingly.<sup>8</sup>

Early in his employment at Mueller, Coppola joined OCAW and remained a member until his discharge on January 14. However, early in 1997, Local 17 began an organizing campaign among Mueller's West Seneca bargaining unit employees. Coppola was one of six employees, who assisted Local 17 in this effort. He spoke to fellow employees, encouraging them to support Local 17.

Coppola was among the employees who had face-to-face contact with Local 17's organizer, Chris Holfelder, who visited Mueller jobsites. Coppola was present at job sites, when Holfelder visited and spoke to the employees about Local 17. Holfelder urged the listening employees to support Local 17, assuring them that they would benefit if Local 17 represented them. Tom Kostek, who became Manager of Mueller's West Seneca-based operations in August 1997, was present on a few occasions, when Holfelder visited a job site and spoke to Coppola and other employees.<sup>9</sup>

In his testimony in this proceeding, Mueller's President Bradley W. Olson denied knowing that Coppola was a member of Local 17. However, he did not deny suspecting that Coppola was a Local 17 adherent, or that Coppola was assisting Local 17's organizing effort.

Janet Keesler showed that she was aware of Local 17's effort in 1997. I find from her testimony that during Local 17's campaign, its organizer, Chris Holfelder, visited Mueller's West

<sup>8</sup> My findings regarding Coppola's authority are based on his testimony, the testimony of Mueller's President Olson and that of Local 8-215's President Ralph Krieger.

<sup>9</sup> I based my findings of fact regarding Coppola's contacts with Local 17 and Manager Kostek's presence on jobsites when Chris Holfelder visited them upon Coppola's uncontradicted testimony. Kostek did not testify in this proceeding.

Seneca office “every week” and told her “how great 17 is. . . .” I also find from her testimony that Holfelder’s visits annoyed her to the point that she complained to Kostek. Manager Kostek told Holfelder to stop bothering Keesler. I find from her testimony that Holfelder’s visits gradually diminished and stopped in November 1997.

5 On one occasion, Keesler told Coppola that Mueller had a list of employees who supported Local 17. Coppola also heard her repeat that remark to other employees.<sup>10</sup>

10 On another occasion, Keesler showed that she considered Coppola to be a Local 17 adherent. She tendered a document to Coppola for his signature. He balked and said he wanted someone to look at it before he would sign it. Keesler remarked that he could not do anything without his “buddy” Chris Holfelder, Local 17’s organizer.<sup>11</sup>

On February 27, Paul Gotto, Manager of the West Seneca-based bargaining unit employees issued the following letter to them:

15 To All MES, Inc. Employees,

As you all may have heard, operating engineers have been confronting various individuals within our company regarding signing up with the Operating Engineers, Local 17.

20 Mueller Energy Services, Inc. as you know has a ratified agreement with the Oil, Chemical and Atomic Workers Union, Local 8–215. Which is affiliated with the AFL–CIO, the largest union organization in the country. (sic) This affiliation has enabled our company to move into areas such as Buffalo, NY and competitively bid work that is done by mostly non–union contractors while providing health insurance, a vacation fund and a pension plan for all employees. And keep relatively busy twelve months a year.

30 Mueller Energy Services, Inc. has been successful in part to our union organization and intends to continue to recognize the OCAW as our union affiliate. (sic) Therefore those who choose to sign up with Local 17 should make sure they have a place of employment when they do, because as OCAW members, we will in no way hire building trades union members, nor will we ever. Signing with Local 17 will just get you a union card and a seat at the union hall waiting for a place of employment and waive your rights under the agreement that Mueller Energy Services Inc. abides by.

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40 <sup>10</sup> Janet Keesler denied that she kept any record of employees who might have joined or assisted Local 17. She also denied that Mueller had asked her to keep such a record. Finally, she denied telling anyone that she had such a list. Keesler did not deny telling Coppola or other employees that Mueller maintained such a list. Assuming that Keesler’s denials raised a conflict with Coppola’s testimony, I have credited him. Keesler seemed anxious to embellish her testimony against Coppola. Thus, she testified that after his discharge, Coppola telephoned to talk to Kostek and added that Coppola “had somewhat of an attitude. . . .” Later, in recounting her conversation with Coppola about the reason for his discharge, Keesler added: “You know, they get away with it like murder over there.” At another point in her testimony, Keesler asserted that an employee with one incident of no–call–no–show “shouldn’t have a job.” In contrast with Keesler’s vindictive demeanor, Coppola testified in a frank manner. Accordingly, I have credited his testimony regarding her remarks to him and other employees about a list.

45 <sup>11</sup> Absent from Keesler’s testimony was any reference to this asserted encounter. As Coppola impressed me as being a candid witness, I have accepted his testimony in this regard.

To continue employment at Mueller Energy, my best advice is to refer those persons from Local 17 to your foreman who will in turn refer them to myself. If you have any questions regarding this matter, feel free to ask me.

5 Sincerely,

Paul Gotto

10 As found by Administrative Law Judge Eleanor MacDonald in *Mueller Energy Services, Inc., Case 3-CA-20542-1 and 2, at pages 3 and 4 (JD (NY)-28-98, May 4, 1998)*, on the same day, after issuing the letter quoted above, Manager Gotto, on instructions from Mueller's President, Bradley W. Olson, sent a letter to his employees, which included the following remarks:

15 We understand from comments of several employees that you have been approached by representatives of Local 17 and to sign authorization cards for that union. (sic) We also understand that you have been promised you will get more money if you join Local 17.

20 We want to emphasize a few points that are obviously not being made clear by representatives of Local 17 in this matter.

25 1. Our company has a contract with the Oil, Chemical, and Atomic Workers Union. Local 17 cannot change the terms and conditions of employment...

2. As an OCAW union contractor, this company could not bargain with Local 17 if it wanted to....

30 3. As a member of this company, you are obligated to the union shop clause negotiated by this company with the OCAW. If you do not tender your periodic dues, you can be subject to discharge for failure to do so.

35 4. If Local 17 is telling you they can get you better wages, then it would have to be with another company. If they are talking about about a job with one of their union employers, it is not likely to be in the gas industry....

5. Local 17 is a craft union. Unless and until one becomes a journeyman within Local 17, one receives wages as an apprentice.

40 6. We understand and appreciate that Local 17 has been at our doorstep because of a dispute they have with a contractor across the street, Arbys....

45 7. In addition to promising higher pay, we understand the representatives of Local 17 have stated that unless you sign with them, you will be subject to strikes and picketing.... This company will not allow anyone to act in such a fashion.

8. If you wish to remain a member of Local 17 and seek employment opportunities that they offer, we would request that you give us at least two weeks advanced notice....

Clearly Local 17 has not told you the complete story. Part of the story they did not tell you is that you are free to resign from a union. That is, you can simply advise Local 17 that you are resigning from their union. It is a simple letter and we enclose a

sample that you could send directly to that union. We express no opinion as to whether you should do so. But, since we will continue to abide by our agreement with the OCAW which requires membership in their union, we see no reason you need to belong to two unions if you wish to remain working for our company.

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The next page of this letter is a sample membership resignation and authorization card revocation form addressed to Local 17.

I find from Coppola's uncontradicted testimony, that he testified at the hearing in *Mueller Energy Services, Inc.*, Case 3-CA-20542-1 and 3-CA-20542-2, on October 14, 1997, to identify one of Manager Gatto's letters to the employees regarding Local 17's organizing campaign. Judge MacDonald's Decision showed that Coppola also testified for the Board's General Counsel about Gatto's supervisory status. Coppola admitted that during his testimony in those cases, he did not mention his affiliation with Local 17. I also find from Coppola's testimony that during a break in that hearing, Coppola accompanied Local 17's Organizer, Chris Holfelder to a cafeteria. Coppola did not fraternize with OCAW Local 8-215's President, Ralph N. Krieger.

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On October 22, 1997, Local 17 filed a petition with the Regional Director of Region 3, in Case 3-RC-10621, seeking a representation election among Mueller's West Seneca-based operators. Nine days later, Charles Gleed, an individual, filed a petition for an election to determine whether OCAW Local 8-215 should be decertified as the exclusive collective-bargaining representative of the bargaining unit at Mueller's West Seneca operations. Thereafter, on November 12, 1997, the Regional Director for Region 3 issued an order postponing the hearing in these representation proceedings indefinitely to permit the AFL-CIO's internal procedures to resolve the dispute between Local 17 and Local 8-215. The Board proceedings in the two representation cases remain in abeyance.

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On January 13, Coppola telephoned Manager Kostek at Mueller's West Seneca office and reported that he was sick. Kostek asked Coppola how sick he was. The employee answered that he was "real sick." Coppola had a fever of 102 degrees. Coppola was sick on the following day and did not report for work on the morning of January 14. Nor did he telephone Mueller's West Seneca office prior to the start of his shift to report that he remained sick and would not report for work that day.

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At approximately 8:00 am on January 14, Manager Kostek telephoned Mueller's President Bradley Olson and reported Coppola's absence and failure to call. Olson sought Kostek's recommendation for dealing with Coppola. Kostek answered that this was Coppola's third no-call-no-show and that the employee should be fired. Olson agreed with Kostek and instructed him to pick up the truck assigned to Coppola. Olson asked for a copy of Coppola's attendance record, which arrived in the President's office late in the afternoon of the same day.

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Later, on the morning of January 14, Manager Kostek and OCAW Local 8-215's Chief Steward James Neswadi arrived outside Coppola's residence. At about 9:30 am, Coppola's girlfriend arrived at the same place. Kostek asked her to obtain the keys to the Mueller truck parked outside Coppola's home. She complied with Kostek's request and he took the truck.

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Later, in the afternoon of the same day, Coppola, who was ill, in bed with a fever, telephoned Mueller's West Seneca office. He spoke to Kostek, who said that Coppola had been discharged. Kostek did not ask Coppola why he had neither reported for work nor called in earlier in the day.

During the evening, Neswadi delivered to Coppola a termination letter dated and prepared on January 14, on Mueller stationary, signed by Manager Kostek, President Olson and Neswadi. The letter, addressed to Coppola, read as follows:

5 RE: No Call No Show 3<sup>rd</sup> Offense

Todd Coppola has had 3 unexcused absents from work. Dates 1-14/97, 10-9/97, and today 1/14/98. This is unacceptable, and action is to be taken. Todd Coppola's position at Mueller Energy Services, Inc. has been terminated as of 1/14/98.

10 The quoted letter was accurate. Mueller's record of Coppola's attendance, beginning January 2, 1997, showed two no-call-no-show incidents prior to January 14. They occurred, respectively, on January 14, 1997, and on October 9, 1997. On January 14, 1997, Coppola received a verbal warning for his no-call-no-show on that date. However, there was no  
15 showing that Coppola received any warning following his second no-call-no-show on October 9, 1997.

20 The attendance data sheet of Mueller employee Bob Ratka showed that on June 2, 1997, he did not work because he reportedly had the flu. Ratka's sheet also showed that he was sick on June 3, 1997, and did not call in. Ratka's attendance data sheet also reported that on October 28, 1997, he was a no-call-no-show. President Olson admitted that to his knowledge Mueller issued no warning, oral or written, to Ratka. Aside from Coppola's three incidents and Ratka's two, the record before me in this case showed no instances of no-call-no-show.

25 On January 16, Coppola filed a grievance with Local 8-215's Chief Steward Neswadi complaining that his discharge was unjust and seeking reinstatement and backpay. On the following day, Local 8-215 began an investigation of Coppola's discharge and thereafter filed a formal grievance with Mueller. The grievance called for reinstatement and backpay for Coppola.  
30 In the same grievance, Local 8-215 demanded that Mueller establish "a written attendance procedure" regarding call-in times.

35 On February 1, Local 8-215 notified Coppola of a hearing on February 18, at Mueller's West Seneca office regarding the grievance on his discharge. Coppola and representatives of Local 8-215 and Mueller attended the meeting. The meeting did not produce any resolution of the grievance. Local 8-215 decided to seek arbitration and so informed Mueller's President.

40 On March 31, Local 8-215 and Mueller reached an agreement on Coppola's grievance. Under this settlement agreement Mueller offered to reemploy Coppola as an operator or a laborer with the appropriate wage scale and his seniority based upon his time in service at Mueller. The settlement agreement also provided that Coppola would report for work on April 1 with provision that he:

45 Recognizes that this is a last chance resolution and that any further infractions of [Mueller's] rules or policies that would subject him to termination will not be subject to any grievance and arbitration procedure. [Local 8-215] will notify the mediation service that arbitration is not now required as the parties have reached a resolution. Mr. Coppola must report ready to work at the start of the shift on April 1, 1998, or he will be treated as refusing the offer of the position.

Local 8-215's President Krieger and a representative of Mueller signed the agreement. Coppola did not sign the agreement. Nor did he report for work on April 1, nor thereafter.



### B. Analysis and Conclusions

The General Counsel urges me to find that Mueller discharged Coppola because he supported Local 17. First, Mueller seeks dismissal of the complaint on the ground that Coppola was a supervisor within the meaning of Section 2(11) of the Act and thus not entitled to the protection of the Act.<sup>12</sup> As the second ground for dismissal Mueller argues that OCAW Local 8–215 and Mueller have resolved the dispute arising from the discharge thereby rendering this proceeding superfluous under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). Finally, Mueller contends that the General Counsel has failed to show that union activity had anything to do with the discharge. For the reasons set forth below, I find merit in the General Counsel's contention.

As the party seeking to establish that Coppola was a supervisor within the meaning of the Act, Mueller has the burden of proving that as a foreman he possessed and exercised at least one of the authorities set forth in Section 2(11) of the Act. *Northwest Florida Legal Services, Inc.*, 320 NLRB 92, n.1 (1995). That section of the Act defines a "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is no merely of a routine or clerical nature, but requires the use of independent judgment.

The first portion of Section 2(11) is read in the disjunctive. The possession of any of the powers enumerated there, however confers supervisory status only if its exercise "involve[s] the use of true independent judgment in the employer's interest." *Beverly Enterprises v. NLRB*, 661 F2d 1095, 1098 (6<sup>th</sup> Cir. 1981). Accord, *Edy's Grand Ice Cream*, 323 NLRB 683, 692 (1997).

There has been no showing that Coppola as foreman enjoyed any of the authorities enumerated in Section 2(11) of the Act. I find from Coppola's testimony that he had no authority to hire or discharge employees, or to give employees time off. Mueller has not shown that he used independent judgment in assigning work to crewmembers. Indeed, the record is silent as to whether Coppola had authority to exercise any of the other authorities recited in Section 2(11) of the Act.

Nor has Mueller shown that Coppola had authority "effectively to recommend such action." Thus, Local 8–215's President Krieger testified that Coppola had no authority to discipline a crewmember but might recommend such action. However Krieger's testimony does not show whether such recommendation would be effective. Nor was there any showing elsewhere in the record that Coppola's recommendation in this or any other regard would be effective.

President Olson conceded that Mueller's foremen have no authority to hire or discharge employees. Olson also testified that foremen have authority to recommend hiring and discharge. However, Olson's testimony does not show how much weight Mueller gives to such recommendations.

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<sup>12</sup> Section 2(3) of the Act excludes from the definition of the term "employee" "any person employed as a supervisor . . . ."

Instead, the record strongly suggests that as a foreman, Coppola acted as a leadman, whose skill and experience enabled him to see that his crew carried out the work assigned by Janet Keesler. There was no showing that as a foreman, Coppola exercised independent judgement in carrying out his function. In sum, I find that the record does not support Mueller's contention that as a foreman, Coppola was a supervisor within the meaning of Section 2(11) of the Act. Accordingly, I find that he was an employee within the meaning of Section 2(3) of the Act and thus entitled to the protection of the Act. *First Western Building Services, Inc.*, 309 NLRB 591, 599–603 (1992).

Under the policy expressed in *Spielberg Manufacturing Company*, 112 NLRB 1080, 1082 (1955), the Board will “defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act.” *Olin Corporation*, 268 NLRB 573, 574 (1984). However, as there was no arbitration award here regarding Coppola's discharge, I find that the so-called “*Spielberg* doctrine” does not apply here.

Instead, applying Board policy regarding settlement of grievances resolving alleged unfair labor practices I have considered whether the settlement between OCAW Local 8-215 and Mueller deprived Coppola of any rights under the Act. *Coca-Cola Bottling Company of Los Angeles*, 243 NLRB 501, 502 (1979). A provision in that settlement agreement states that Coppola “recognizes that this is a last chance resolution, and that any further infractions of the Company rules or policies that would subject him to termination will not be subject to any grievance and arbitration procedure.” I find that this provision deprived Coppola of his right under Section 7 of the Act to enforce the provisions of the collective-bargaining agreement which would have covered his employment, had he accepted reinstatement under the settlement. See *Roadway Express Inc.*, 217 NLRB 278, 279 (1975). Therefore, I find that the deferral sought by Mueller is repugnant to Board policy. *John C. Mandel Security Bureau, Inc.*, 202 NLRB 117 (1973). Accordingly, I shall not defer to the settlement reached by Local 8-215 and Mueller.

An employer violates Section 8(a)(3) and (1) of the Act by discharging an employee for engaging in union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983); *Local One, Amalgamated Lithographers v. NLRB*, 729 F.2d 172, 175 (2d Cir. 1984). In *NLRB v. Transportation Management Corp.*, *supra* at 397, 401–403, the Supreme Court approved the test for determining motivation in discrimination cases, as expressed by the Board in *Wright Line, a Division of Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enfd.* on other grounds, 662 F.2d 89 (1<sup>st</sup> Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under that test the General Counsel must show that the discharged employee's union activity was “a motivating factor” in the employer's decision to discharge the employee. *Wright Line, supra* at 1089. The discharge will then be found unlawful unless the employer is able to show, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. 462 U.S. at 397, 401–403; *Manno Electric, Inc.*, 321 NLRB 278, 280, n.3 (1996). If the explanation advanced by the employer for its action is a pretext—that is, if the reasons either did not exist or were not in fact relied upon—it necessarily follows that the employer has not met its burden of persuasion and the inquiry is logically at an end. 251 NLRB at 1084. Here, I find that the General Counsel has sustained his evidentiary burden.

In 1997, Coppola was one of six Mueller employees, who assisted Local 17's organizing effort among the West Seneca-based employees. He encouraged fellow employees to support Local 17. During that year, Manager Tom Kostek, on more than one occasion, observed Coppola conversing with Local 17's organizer, Holfelder, who had also visited Kostek's office “every week” during its organizing drive. Later in 1997, Coppola assisted Local 17's cause by

testifying for the General Counsel in an unfair labor proceeding growing out of its organizing drive at Mueller.

Kostek, Keesler and Olson denied knowing that Coppola was a member of Local 17. However, they did not deny knowledge of his activity and sentiment favoring that local. However, Kostek had on occasions observed Coppola fraternizing with Local 17's organizer. Kostek's contacts with Olson would have provided the manager with opportunity to inform the president of Coppola's alignment with the labor organization described with hostility in Mueller's letters of February 27, 1997, to its employees.

Assuming that Keesler was a member of Mueller's management, her remarks to Coppola during 1997 showing that she was aware of his alignment with Local 17 would be attributable to her employer. The record shows that Keesler, using independent judgment, assigns and reassigns crews during the workday. I also find that she had authority to discipline employees. Thus, when employee Saviano refused to drive a truck, Keesler sent him home for the rest of the day. I find, therefore that, at all times material to this case, Keesler was a supervisor within the meaning of Section 2(11) of the Act.

I find that Keesler's assertion to Coppola and other employees that Mueller maintained a list of employees aligned with Local 17 showed that Mueller was troubled by their support for that interloper.<sup>13</sup> Similarly, Keesler reflected Mueller's annoyance with Local 17 when she chided Coppola about not being able to make a decision without his "buddy" Chris Holfelder, Local 17's organizer.

Manager Gotto's two letters to the West Seneca's employees showed Mueller's willingness to engage in unlawful conduct in response to Local 17's campaign. As Judge MacDonald found in her decision in *Mueller Energy Services, Inc.*, JD(NY)-28-98 p.4 (May 4, 1998), the first of the two letters included "a direct threat that employees who join Local 17 will lose their jobs with Mueller. . . ." Judge MacDonald also found that the same letter conditioned "continued employment upon reporting persons engaged in concerted activities to supervisors." *Id.* Judge MacDonald found that both quoted excerpts of the first letter impacted upon the West Seneca employees' right under Section 7 of the Act to support Local 17, and thus violated Section 8(a)(1) of the Act.

In the same decision, *Mueller Energy Services, Inc.*, at p. 5, Judge MacDonald considered Gotto's second letter, and found that it violated Section 8(a)(1) of the Act on two counts. First, Judge MacDonald found that this letter created "an impression among [Mueller's] employees that their union activities were under surveillance." She also found that this second letter included a solicitation of resignation from membership in Local 17, which, when read with the threat in the first letter was likely to coerce employees into quitting Local 17. In light of these two letters, it seems likely that Mueller's management was hostile to Coppola's persistent alignment with Local 17.

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<sup>13</sup> The General Counsel has not alleged that those remarks violated the Act and the record did not show whether Keesler made them within the six-month period of limitations imposed by Section 10(b) of the Act. However, under Board policy, Keesler's remarks may be used as background for the alleged discrimination against Coppola. *International Alliance of Theatrical and Stage Employees Local 592*, 266 NLRB 703, n. 2 (1983).

The timing and alacrity of Mueller's decision to discharge Coppola suggests a strong desire to get rid of a leading Local 17 adherent. Thus, the decision came approximately two months after the Regional Director's order postponing the hearing in the representation cases. I also note that on January 14, one day after Coppola had reported that he was ill and had fever, neither Kostek nor any other member of Mueller's management took the trouble to call him to find out if he remained ill and had fever. Instead, Kostek, with President Olson's express approval, seized upon Coppola's neglect to call and repeat the message of the previous afternoon as an opportunity to discharge Coppola. Further, even though Kostek took the trouble to go to Coppola's residence to fetch Mueller's truck, he did not visit Coppola to find out if he was sick.

Reflecting upon the evidence I have recited above, I find that the General Counsel has made a strong showing that Todd L. Coppola's union activity and sentiment motivated Kostek and Olson to discharge him on January 14. I also find that Mueller's effort to rebut that evidence falls short of the mark.

According to Mueller, Coppola's no-call-no-show on January 14, was the third such incident on his record and discharge was the appropriate discipline. However, the record shows that prior to January 14, Mueller displayed a permissive attitude toward such conduct. Indeed, there was no showing that Mueller discharged any employee for no-call-no-show prior to that date. Employee Bob Ratka's record showed that he had a no-call-no-show on June 3, 1997, and again on October 28, 1997, yet he did not receive any warning for either incident. Mueller gave a verbal warning to Coppola for his no-call-no-show on January 14, 1997, but no warning of any kind for his no-call-no-show incident of October 9, 1997. Further, Mueller had no policy regarding disciplining employees for such misconduct until February 1998. Thus, Mueller was willing to countenance no-call-no-show from its West Seneca employees until January 14.

The sudden change in attitude toward no-call-no-show came in the wake of Local 17's organizing campaign in which Coppola participated as an advocate for that local. As shown above, Mueller expressed hostility toward employees, who aligned themselves with Local 17's cause. Mueller threatened to discharge such employees and emphasized that membership in Local 17 was incompatible with continued employment at Mueller. Mueller has not provided any explanation to rebut the General Counsel's showing that this hostility motivated Kostek and Olson to seize upon what had been considered a minor infraction to punish Coppola for supporting Local 17.

In sum, I find that the General Counsel has shown by a preponderance of the record evidence that Mueller's proffered excuse for discharging Coppola was pretextual. Accordingly, I find that by discharging Coppola on January 14, Mueller violated Section 8(a)(3) and (1) of the Act.

#### Conclusions of Law

1. Respondent, Mueller Energy Services, Inc., is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

2. International Union of Operating Engineers, Local Union No. 17 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(3) and (1) of the Act by discharging Todd L. Coppola because of his union activity and support for International Union of Operating Engineers, Local Union No. 17.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## 5 Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

10 The Respondent having discriminatorily discharged employee Todd L. Coppola, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus  
15 interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that Respondent be required to rescind the discharge imposed upon Todd L. Coppola, and to remove from its files any reference to his discharge. I shall further recommend that Respondent be required to notify Coppola that it has removed the  
20 references to his unlawful discharge and that it will not use it against Coppola in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

## 25 ORDER

The Respondent, Mueller Energy Services, Inc., West Seneca, New York, its officers, agents, successors, and assigns, shall

### 30 1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Union of Operating Engineers, Local Union No. 17. or any other union.

35 (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

40 (a) Within 14 days from the date of this Order, offer Todd L. Coppola full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

45 (b) Make Todd L. Coppola whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the Todd L. Coppola in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in West Seneca, New York copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 14, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 18, 1999

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Leonard M. Wagman  
Administrative Law Judge

<sup>15</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Union of Operating Engineers, Local Union No. 17. or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Todd L. Coppola full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Todd L. Coppola whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Todd L. Coppola and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MUELLER ENERGY SERVICES, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 111 West Huron Street, Room 901, Buffalo, New York 14202-2387, Telephone 716-551-4951.

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- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
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WE WILL make Todd L. Coppola whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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\_\_\_\_\_  
MUELLER ENERGY SERVICES, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 111 West Huron Street, Room 901, Buffalo, New York 14202-2387, Telephone 716-551-4951.



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